

Hearing:
October 18, 2005

**THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB**

Mailed:
January 24, 2006
Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Radian, Inc.

Serial No. 76467020

Patrick D. McPherson, D. Joseph English and L. Lawton
Rogers, III, of Duane Morris LLP for Radian, Inc.

Kathleen M. Vanston, Trademark Examining Attorney, Law
Office 103 (Michael Hamilton, Managing Attorney).

Before Walters, Bucher and Kuhlke, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Radian Inc. seeks registration on the Principal
Register of the mark **ME-KEY** (*standard character drawing*) for
goods identified in the application, as amended, as
follows:

"physical access monitoring devices, namely
biometric identification processors" in
International Class 9.¹

¹ Application Serial No. 76467020 was filed on November 5,
2002 based upon applicant's allegation of a *bona fide* intention
to use the mark in commerce.

This case is now before the Board on appeal from the final refusal of the Trademark Examining Attorney to register this mark based upon Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). The Trademark Examining Attorney has found that applicant's mark, when used in connection with the identified goods, so resembles the mark **MECARD** (*standard character drawing*) registered for goods identified as follows:

"encoded smart cards containing programming used to store information in electronic format for data storage and access control; magnetic encoded card readers; and computer software in the field of network identification and authentication, namely, for outside access to a building, a network, a database, personal data, and data encryption and decryption, identification of persons by stored data on smart cards, password for computer programs and computer files, and security for communications between network users and public networks such as the global computer network; a computer system that incorporates a smart card, a smart card reader and the software to insure the security of businesses, employees and computer networks, and to provide network security and access control, a data repository for emergency medical information and personnel data, systems integrity, and identification with digital photo images and fingerprints encoded in the smart card" also in International Class 9,²

² Reg. No. 2734621 issued to Sense Technologies, Inc. on July 8, 2003, based upon allegations of use in commerce since at least as early as November 1, 2001.

as to be likely to cause confusion, to cause mistake or to deceive.

Applicant and the Trademark Examining Attorney fully briefed the case and both appeared at an oral hearing held on October 18, 2005 before this panel of the Board.

We reverse the refusal to register.

The Trademark Examining Attorney argues that the goods of registrant and applicant "are highly related," arguing that both "are used for biometric identification" and that as a result, the goods may be encountered by the same purchasers. She contends that the terms create highly similar commercial impressions inasmuch as the leading word "ME is a dominant portion of each mark" and involves a "clever use of [the word] ME in each mark." She argues that "[i]n the electronics field, case decisions have held that the sale of related merchandise under the same or similar marks would be likely to cause confusion in spite of the sophistication and technical background of the purchasers." Finally, she takes the position that under the circumstances of this case, the alleged third-party registrations containing the word "ME" are not relevant in determining likelihood of confusion herein.

By contrast, applicant argues that the Trademark Examining Attorney has not adequately supported her conclusion that the common portion of the marks, ME, is the dominant feature of both marks, ME-KEY and MECARD. Applicant contends that the Trademark Examining Attorney has accorded registrant's mark a greater scope of protection than it deserves, and denies that the commercial impressions of the respective marks are similar when considered in their entirety. Finally, applicant also argues that the Trademark Examining Attorney has failed even to consider the importance of the factor dealing with the sophistication of the relevant customers.

Our determination under Section 2(d) is based upon an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

We turn first to the du Pont factor focusing on the similarity of the marks in their entirety. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

The Trademark Examining Attorney argues that applicant's mark is highly similar to the registered mark in appearance

and overall commercial impression. Specifically, she argues that "[t]he clever use of ME in each mark results in the creation of similar commercial impressions." On this same point, applicant argues as follows:

When the MECARD mark is considered as a whole, it is clear that the mark is descriptive of the goods for which it is associated; the ME portion for the personal data of the card holder, and CARD portion for the card on which the personal data is encoded. When the ME-KEY mark is considered as a whole, the ME portion is descriptive of the owner of the biometric information, but the key is not descriptive of the biometric processor. Thus, ME is a descriptive portion of both marks rather than the dominant portion of both marks as asserted by the examiner. When the marks are considered in their entirety there is no basis to hold the marks highly similar.

Applicant's reply brief, p. 5.

The fact that ME is the first term in both marks lends support to the position of the Trademark Examining Attorney that it is dominant, everything else being equal. Presto Products, Inc. v. Nice-Pak Products Inc., 9 USPQ2d 1895, 1897 (TTAB 1988). On the other hand, if the word "ME" is indeed merely descriptive in the context of both marks, as argued by applicant, it is less likely to be perceived as the dominant portion of these respective marks. "ME," as a first person pronoun, is at the very least, suggestive, in connection with personal identification data encoded in a

card or processing system.³ Similarly, the KEY portion of applicant's mark is suggestive of the device identified in the application; and the CARD portion of the mark in the cited registration is highly suggestive in connection with the "smart cards" identified in the registration. In view of the suggestiveness of both portions of the marks herein, we find that neither portion of either mark is dominant in appearance or connotation. However, both marks, considered in their entireties, connote devices containing personal information about the owner and, as such, each mark is suggestive in connection with the respective goods and the connotations of both marks similarly suggest a card or device that contains personal information regarding its owner. While the marks ME-KEY and MECARD have obvious differences as to appearance, sound and commercial impression, given the similarities in connotation, this factor weighs in favor of the Office's position.

Accordingly, we turn to the similarity or dissimilarity of the goods as described in the application and cited registration. The Trademark Examining Attorney

³ As to the strength of the cited mark, although applicant argues from a search summary of third-party registrations that the ME prefix is extremely weak as applied to registrant's goods, the record does not contain copies of these registrations that would permit us to determine the number and nature of similar marks registered for similar goods.

argues that inasmuch as registrant's identification of goods refers, *inter alia*, to encoded fingerprints, registrant's goods are used for biometric identification purposes. Because applicant's goods are identified as "physical access monitoring devices, namely, biometric identification processors," she concludes that these respective goods are highly related.

Applicant, by contrast, charges that the Trademark Examining Attorney has mischaracterized the nature of these goods. Applicant argues that registrant's goods involve encoded smart cards where the data that is encoded on the card is read by a digital data processor. By contrast, applicant explains that its goods involve processors capable of processing raw biometric information, "such as optical scanners for iris recognition, voice analyzers for voice recognition, blood pressure monitors for physiological monitoring, etc. Thus applicant's goods are processors for receiving biological inputs, while registrant's processors receive digital inputs." Applicant's reply brief, pp. 2 - 3.

Applicant is correct in noting that, as identified, registrant's smart card is encoded with information that identifies the card, while applicant's biometric processors

will be designed to read information from an actual person. Additionally, we note that registrant's system serves purposes other than physical access monitoring as it serves, *inter alia*, as "a data repository for emergency medical information and personnel data." Due to the differences in the exact nature of the respective goods, we conclude that, while these goods may well be marketed as alternative ways of restricting access, registrant's and applicant's goods are quite different in the way they operate.

By their very terms, these goods are alternative ways of achieving security by limiting access. Hence, on a related du Pont factor, even in the absence of any direct evidence on this matter, we find an overlap in the established, likely-to-continue trade channels.

As to the du Pont factor focusing on the conditions under which and buyers to whom sales are made, applicant argues that given the respective product's importance to their buyer's security needs and the respective product's high cost, the relevant consumers are sophisticated purchasers who will take care in making purchasing decisions and are not likely to be confused by the parties' similar marks, citing to Checkpoint Systems, Inc. v. Check

Point Software Technologies, Inc., 269 F.3d 270, 286, 60 USPQ2d 1609 (3rd Cir. 2001). Although the record contains no evidence as to the cost of registrant's or applicant's goods, the purchasers of these respective products are likely to be highly sophisticated in security, facilities management and information technology. By definition, registrant's and applicant's products will never be impulse purchases, but rather will be subject to sophisticated sales efforts, possible face-to-face meetings and careful customer decision making.

In conclusion, while the marks are somewhat similar, and the goods are used for the same purpose of controlling access and, as such, will travel in the same channels of trade, nonetheless, we find that the actual differences between the goods, when combined with the sophistication of the purchasers and the likely care involved in the purchase decision, mandates a finding of no likelihood of confusion.

Decision: The refusal to register under Section 2(d) of the Trademark Act is hereby reversed.